SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JERRY CADIGAN and NANCY CATON CADIGAN, as Co-Administrators of the Estate of TREVOR NORRIS CADIGAN, Deceased,	:	
Plaintiffs,	:	Index No. 152286/2018
-against-	:	
LIBERTY HELICOPTERS, INC., a New York Corporation; NY ON AIR LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; FLYNYON LLC, a Delaware Limited Liability Company; MERIDIAN CONSULTING I CORPORATION, INC., a Delaware Corporation; RICHARD ZEMKE VANCE, a Connecticut resident; AIRBUS HELICOPTERS, S.A.S., a French Corporation; AIRBUS HELICOPTERS, INC., a Delaware Corporation; APICAL INDUSTRIES, INC. d/b/a DART AEROSPACE, a California Corporation; EUROTEC VERTICAL FLIGHT SOLUTIONS, LLC, a Kansas Corporation; and EUROTEC CANADA LTD., a Canada Limited Corporation,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT EUROTEC VERTICAL FLIGHT SOLUTIONS, LLC'S AND DEFENDANT EUROTEC CANADA LTD.'S MOTION TO DISMISS PURSUANT TO CPLR RULE 3211(a)(8) AND IN SUPPORT OF THEIR CROSS-MOTION TO DEFER RULING ON THE MOTION TO DISMISS AND TO COMPEL DEFENDANTS EUROTEC VERTICAL FLIGHT SOLUTIONS, LLC AND DEFENDANTS EUROTEC CANADA LTD. TO SUBMIT TO JURISDICTIONAL DISCOVERY

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Defendants.	:	

Plaintiffs, by and through counsel, respectfully submit this Memorandum of Law, together with the accompanying Affirmation of Matthew F. Schwartz and supporting exhibits, in opposition to the motion by defendants EuroTec Vertical Flight Solutions, LLC and EuroTec Canada Ltd.'s to dismiss the complaint for lack of personal jurisdiction pursuant to CPLR Rule 3211(a)(8) and in support of their cross-motion to defer ruling on the motion to dismiss and compel defendants EuroTec Vertical Flight Solutions, LLC and EuroTec Canada Ltd. to submit to jurisdictional discovery pursuant to CPLR Rule 3211(d) for the reasons set forth below.

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I. FACTUAL BACKGROUND AND PROCEDURAL CONTEXT OF MOTION

A. Introduction

The affidavits attached to the EuroTec Defendants' Motion to Dismiss are notable for as much as what they say as what they do not say. The facts they address are either irrelevant or ambiguous. Some facts that are relevant to likely bases of jurisdiction are notably absent. In short, the EuroTec Defendants provide no assistance to this Court in determining whether it may exercise jurisdiction over them.

Plaintiffs, on the other hand, offer facts that show a good start and that their claim to jurisdiction is not frivolous. The evidence available to Plaintiffs – publicly available documents and limited documents produced by EuroTec pursuant to subpoena before they were party to the case – show there is a basis for jurisdiction. Jurisdictional discovery will then fill in any blanks that now exist.

B. Basic Facts Underlying Plaintiffs' Claims Against EuroTec Vertical Flight Solutions, LLC and EuroTec Canada Ltd.

On March 11, 2018, Trevor Norris Cadigan was a passenger in a helicopter on an aerial photography tour operated by Liberty Helicopters when the helicopter lost altitude and descended into the East River off Manhattan. *Second Amd. Complt.*, ¶¶ 58-60. The helicopter rolled to its side and sank, drowning Mr. Cadigan. *Second Amd. Complt.*, ¶¶ 61-63. The helicopter was equipped with an emergency flotation system manufactured by Apical Industries, Inc., d/b/a Dart Aerospace ("Apical") (Apical Invoice, *Schwartz Aff.* ¶ 3, Exh. A). The emergency flotation system was purchased and installed by EuroTec Canada Ltd. (Invoice, *Schwartz Aff.* ¶ 3, Exh. A; and Purchase Order, *Schwartz Aff.* ¶ 3, Exh. B).

Trevor Cadigan's parents, Jerry Cadigan and Nancy Caton Cadigan, as Co-Administrators of his Estate, filed this action against Apical, Meridian Consulting I Corporation ("Meridian"),

Liberty Helicopters, EuroTec Vertical Flight Solutions ("EVFS"), EuroTec Canada Ltd., and others on March 28, 2018.

All defendants, other than EVFS and EuroTec Canada Ltd. have appeared, answered, and waived jurisdictional defenses. *Schwartz Aff.* ¶ 5. On April 23, 2019, Plaintiffs served Requests for Production of Documents on Jurisdictional Issues on Defendants EVFS and EuroTec Canada Ltd. *Schwartz Aff.* ¶ 6, Exhs. C and D. Plaintiffs also served notices for the depositions of Defendants EVFS and EuroTec Canada Ltd., as well as for CEO Chad Decker and Managing Partner Hossain Golanbari. *Schwartz Aff.* ¶ 6, Exhs. E, F, G and H. The EuroTec Defendants have failed to provide any jurisdictional discovery. *Schwartz Aff.* ¶ 7. To date, Defendants EVFS and EuroTec Canada Ltd. have not provided any jurisdictional discovery. *Schwartz Aff.* ¶ 7.

C. Publicly Available Facts Support the Exercise of Jurisdiction or, at the Very Least, the Undertaking of Jurisdictional Discovery

Defendant Meridian owned the subject helicopter (Defendants Liberty Helicopters, Inc., Richard Zemke Vance and Meridian Consulting I Corporation, Inc.'s Amended Verified Answer to Plaintiffs' First Amended Complaint, Dkt No. 28). Defendant Liberty Helicopters operated the subject helicopter equipped with Apical's defective flotation system. *Id.* Liberty Helicopters has the largest Airbus Helicopter fleet in New York City (Liberty Helicopters website at https://www.libertyhelicopter.com/helicopter-tour-packages-nyc/, *Schwartz Aff.* ¶ 8, Exh. I).

EVFS provides products and services worldwide, making this claim on its website:

> So whether you are a tour operator in Las Vegas needing an engine or in need of a sliding door kit for a production aircraft in Australia, our knowledgeable and courteous sales staff will deliver on time, every time, with reliable components for every type of operation; anywhere in the world.

(EVFS website at http://www.eurotecvfs.com/airbus_products.php, *Schwartz Aff.* ¶ 9, Exh. J).

In 2011, EVFS opened "EuroTec Canada, Inc., EuroTec's newest facility located in Toronto, Canada." (Vertical Magazine, *EuroTec Vertical Flight Solutions, LLC, provider of Eurocopter and Turbomeca service and support, opening EuroTec Canada, Inc.*, March 5, 2011 at https://www.verticalmag.com/features/eurotec-vertical-flight-solutions-llc-provider-of-eurocopter-and-turbomeca-service-and-support-opening-eurotec-canada-inc-html/, *Schwartz Aff.* ¶ 10, Exh. K). EuroTec Canada is a wholly-owned subsidiary of EVFS and "was formed in partnership with Hoss Golanbari who shall also serve as managing partner." *Id.* EuroTec Canada was opened to "complement [EVFS's] existing operations in the U.S." and serve the Canadian market:

> "The site will further enhance our proximity of support," said EuroTec President and CEO Chad Decker. "Our Canadian customers will have immediate access to our inventory in case of an AOG situation. . . . Our Canadian customers will no longer have to shoulder the expense in dealing with trans-border shipments."

Id.

On EuroTec Canada's Facebook page, the reader is directed to the website of EVFS at www.eurotecvfs.com (https://www.facebook.com/EurotecCanada/, *Schwartz Aff.* ¶ 11, Exh. L). EVFS, on the other hand, maintains a website, which in the "Contact Information" section contains email addresses for Sales and General Inquiries, MRO Inquiries, Engine and Component Rental Inquiries, Aircraft Sales and Leasing Inquiries, Accounting Inquiries, and Employment Inquiries for EVFS (EVFS website, "Contact Us" at http://www.eurotecvfs.com/contact_us.php, *Schwartz Aff.* ¶ 11, Exh. M). EuroTec Canada has no such listings *Id.*

Chad Decker serves as the President and CEO of both EVFS and EuroTec Canada with Hoss Golanbari serving as Vice President and Managing Partner of EuroTec Canada (Helicopters Magazine, June 5, 2014, at https://www.helicoptersmagazine.com/eurotec-canada-dynamic-solution-systems-inc-sign-key-pact-4760/, *Schwartz Aff.* ¶ 12, Exh. N; Skies Magazine, March 6,

2019, at https://www.skiesmag.com/press-releases/eurotec-makes-heli-expo-announcements/, *Schwartz Aff.* ¶ 12, Exh. O). EVFS and EuroTec Canada share a Director of Sales and Business Development, Paul M. Ross Jr. (EVFS Press Release, "EuroTec welcomes new director of sales and Business Development, July 3, 2018, at https://www.verticalmag.com/press-releases/eurotec-welcomes-new-director-of-sales-and-business-development/, *Schwartz Aff.* ¶ 12, Exh. P).

Garmin awarded a single dealership to EVFS and EuroTec Canada (AirMed&Rescue website, February 28, 2018, at https://www.airmedandrescue.com/story/112714/garmin-deal-eurotec, *Schwartz Aff.* ¶ 13, Exh. Q), as did Genesys Aerosystems (Vertical Magazine, February 6, 2019, at https://www.verticalmag.com/press-releases/eurotec-becomes-genesys-aerosystems-dealership/, *Schwartz Aff.* ¶ 13, Exh. R).

EuroTec Canada is also a partner in DART Aerospace's Approved Maintenance Center network (DART Aerospace website, News & Press dated, January 12, 2016 at https://www.dartaerospace.com/en/blog/news-press/dart-aerospace-launches-its-new-approved-maintenance-center-network-offering-very-competitive-aftermarket-solutions-to-better-serve-the-industry.html *Schwartz Aff.* ¶ 14, Exh. S). DART selected EuroTec Canada and the other partners in the network "based on their market reach and quality of service." *Id.*

In or around October 2013, EuroTec Canada agreed to install Apical's flotation system on the subject helicopter for Meridian (Rotorcraft Service Agreement, Exhibit A to Affirmation of Hossein Golanbari, *Schwartz Aff.* ¶ 15, Exh. T). Attachment A to the Rotorcraft Service Agreement for the installation of the flotation system is listed as "Liberty Helicopters Build Sheet." *Id.* Attachment C to the Rotorcraft Service Agreement is only a cover sheet for a "limited warranty" with no limited warranty attached. *Id.* In addition to EuroTec and Meridian, the

Rotorcraft Service Agreement includes EVFS as a party to receive notices under the contract. *Id.* at 5, ¶ 15.

In New York, Liberty Helicopters flies out of the Downtown Manhattan Heliport (NYC The Official Guide at https://www.nycgo.com/venues/liberty-helicopters-inc, *Schwartz Aff.* ¶ 16, Exh. U). Liberty Helicopters' maintenance center is located just outside New York City in Kearney, New Jersey (Helihub.com at https://helihub.com/2011/04/28/liberty-helicopters-and-analar-corp-relocate-to-hhi-heliport/, *Schwartz Aff.* ¶ 16, Exh. V). That is "only two minutes' flying time away from Manhattan" (AINonline at https://www.ainonline.com/aviation-news/aviation-international-news/2011-02-24/helo-only-fbo-opens-new-jersey, *Schwartz Aff.* ¶ 16, Exh. W).

"Over New York City, there were over 56,000 sightseeing tourist helicopter trips in 2014" (Adrian Benepe and Merritt Birnbaum, A Plague of Helicopters is Ruining New York, The New York Times, January 30, 2016, https://www.nytimes.com/2016/01/31/opinion/sunday/a-plague-of-helicopters-is-ruining-new-york.html, *Schwartz Aff.* ¶ 17, Exh. X). Of all the helicopters flying over New York, "[n]one of the helicopters is actually based here" (AOPA[1] at https://www.aopa.org/news-and-media/all-news/2011/september/01/above-ny, *Schwartz Aff.* Exh. ¶ 17, Y). The reason for that are "[s]trict hours and regulations allow helicopters in the city during limited times." *Id.* As a result, "[a]ll of the operators—tour, charter, and corporate—keep maintenance and administrative hangars outside of the city, mostly in New Jersey." *Id.* Under the New York City Helicopter Sightseeing Plan, air tours can only operate from 9 a.m. to 7 p.m. on weekdays (Mitchell L. Moss and Hugh O'Neill, Heliports and Their Importance to New York City, EASTERN REGION HELICOPTER COUNCIL, February 2012,

[1] "Aircraft Owners & Pilots Association

https://helenrosenthal.com/wp-content/uploads/2015/11/Industry-Report-Mitchell-Moss-NYU.pdf, p. 19, *Schwartz Aff.* ¶ 17, Exh. Z).

II. LEGAL AUTHORITY AND ANALYSIS

A. Discovery on the Issue of Personal Jurisdiction Is Warranted in This Case

In responding to a motion to dismiss, New York rules provide for discovery to obtain the facts necessary to oppose the motion. CPLR Rule 3211(d). In requesting jurisdictional discovery, "a plaintiff need not make a *prima facie* showing of jurisdiction, but instead must only set forth a sufficient start, and show that its position is not frivolous." *Expert Sewer & Drain, LLC v. New England Mun. Equipment Co., Inc.*, 106 A.D.3d 775, 776 (2nd Dep't 2013). A "start" requires only that a plaintiff show "that facts may exist to support the exercise of personal jurisdiction over the defendant." *Id.* In evaluating whether the plaintiff has met the burden, the court "accept[s] as true the allegations set forth in the complaint and in the plaintiff's opposition papers, and accord[s] the plaintiff the benefit of every favorable inference." *Whitcraft v. Runyon*, 123 A.D.2d 811, 812 (2nd Dep't 2014).

Because "the jurisdictional issue is likely to be complex," discovery "is desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely based on inconclusive preliminary affidavits." *Expert Sewer*, 106 A.D.3d at 776 (ruling that "the Supreme Court should have exercised its discretion pursuant to CPLR 3211(d) to deny the motion without prejudice to renewal upon the completion of discovery").

The EuroTec Defendants offer facts that fail to prove that this Court may not exercise jurisdiction over them. Plaintiffs, on the other hand, offer facts that show a good start and that their position is not frivolous. Plaintiffs have also served document requests and deposition notices seeking limited jurisdictional discovery to aid the Court in assessing the issue. *Schwartz Aff.* ¶ 6,

Exhs. C, D, E, F, G and H. Jurisdictional discovery will lead to a more accurate judgment than can be otherwise achieved based on the limited, self-serving affidavits from two EuroTec executives now before the Court.

B. EVFS Is Subject to the Jurisdiction of this Court Based on the Activities of Its Subsidiary, EuroTec Canada

EVFS claims that it is not subject to the jurisdiction of this Court because it "did not provide any parts or services to the [subject] helicopter." But EuroTec Canada purchased and installed the flotation system on this helicopter. This activity and the fact that EuroTec Canada operates as a "mere department" of EVFS subjects the latter to the jurisdiction of this Court.

In a Second Circuit Court of Appeals case applying New York's long-arm statute, the court considered whether the activities in New York of a wholly-owned subsidiary of a Kansas corporation subjected the parent to jurisdiction in New York. *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft*, 751 F.2d 117, 120 (2d Cir. 1984). In determining whether the subsidiary operated as a "mere department" of the parent company, the court applied four factors:

1. Common ownership;
2. Financial dependency of the subsidiary on the parent corporation;
3. The degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and
4. The degree of control over the marketing and operational policies of the subsidiary exercised by the parent.

Beech, 751 F.2d at 120-22. While common ownership is essential to jurisdiction, the remaining factors of the *Beech* test are important but not essential. *King County, Wash. v. IKB Deutsche Industriebank AG*, 712 F.Supp.2d 104, 112-13 (S.D.N.Y. 2010). Those factors must be balanced and some need not "weigh entirely in the plaintiffs' favor." *Id.*

Applying these factors, the court found that Beech's wholly owning the subsidiary satisfied the first factor. As to the second factor of financial dependence, the court found the subsidiary entirely dependent on the Beech's financial support to stay in business based on: (1) Beech providing a no-interest loan with no due date and the subsidiary's large accounts payable balance with Beech; (2) a large loan balance with another of Beech's subsidiaries; (3) Beech not requiring the subsidiary to operate on a cash-on-delivery basis that independent companies were subject to; and (4) the subsidiary's significant losses in the most recent two years. *Beech*, 751 F.2d at 121.

Applying the third factor of interference in the selection of executive personnel and a lack of corporate formality, the court found that the parent selected the subsidiary's executives and transferred them between companies and the subsidiary failed to hold directors' meetings. *Id.* at 121-22. As for the fourth factor of marketing and operational control, the parent's tight control over all marketing aspects with all its distributors, including training distributors' personnel and controlling ownership changes of the distributors, combined with the subsidiary's selling only the parent company's products satisfied the fourth factor. Based on these facts, the court ruled that jurisdiction existed over the parent under New York law based on its subsidiary's activities in New York.

Here, as was true of the defendant in *Beech* and its subsidiary, EVFS wholly owns EuroTec Canada (*Schwartz Aff.* ¶ 10, Exh. K), satisfying the first factor. No public evidence exists of the degree to which EuroTec Canada depends financially upon EVFS. The jurisdictional discovery sought by Plaintiffs will reveal that information. See Document Requests 2, 11, 19, 34-35, 45 (*Schwartz Aff.* ¶ 6, Exhs. C and D).

The third factor, EVFS's interference in the selection of EuroTec Canada personnel is shown by the two companies sharing executives: Chad Decker serves as the President and CEO

of both EVFS and EuroTec Canada (*Schwartz Aff.* ¶ 12, Exhs. N and O) and Paul M. Ross, Jr. serves as Director, Sales and Business Development for both companies (*Schwartz Aff.* ¶ 12, Exh. P). Because EVFS's website contains email addresses for several executive positions and fails to list those same positions for EuroTec Canada, it is likely that these companies share more personnel in top positions (*Schwartz Aff.*, ¶ 11, Exh. M). The deposition and document discovery sought by Plaintiffs will reveal that information. See Document Requests 4, 12, 14, 38, 44 (*Schwartz Aff.* ¶ 6, Exhs. C and D).

As for the fourth factor of marketing and operational control, EVFS has a website and EuroTec Canada has only a Facebook page (*Schwartz Aff.* ¶ 11, Exhs. L and M. On EuroTec Canada's Facebook page, the reader is directed to the website of EVFS (*Schwartz Aff.* ¶ 11, Exh. L). Third parties award a single dealership to both companies (*Schwartz Aff.* ¶ 13, Exhs. Q and R), demonstrating that the EuroTec Defendants' hold themselves out to the world as a single entity.

Operational control is demonstrated by EVFS calling EuroTec Canada "EuroTec's newest facility located in Toronto" (*Schwartz Aff.* ¶ 10, Exh. K). This reference is identical to another case where a subsidiary was referred to as another company's "Mississauga plant." *Hume v. Lines*, 2016 WL 6524285 at 8 (W.D.N.Y. 2016) (finding jurisdiction proper even though only three of the four factors was satisfied).

In addition, the creation of a subsidiary to carry on the parent's business also indicates that a subsidiary serves as an agent for the parent. *Dorfman v. Marriott Intern. Hotels, Inc.*, 2002 WL 14363 at 10 (S.D.N.Y. 2002). Here, EuroTec Canada was opened to "complement EVFS's existing operations in the U.S." and to serve the Canadian market for EVFS products and services (*Schwartz Aff.* ¶ 10, Exh. K).

EVFS also appears to control the legal affairs of EuroTec Canada. EVFS appears as a party requiring notice in the contract between EuroTec Canada and Meridian (*Schwartz Aff.* ¶ 15, Exh. T). In addition, EVFS and EuroTec Canada share counsel in this case. They are both represented by Robert J. Brown, David H. Fromm, and Fred G. Wexler of Brown Gavalas & Fromm LLP. Affiliated companies sharing counsel provides evidence under two of the Beech factors: common personnel and operational control. *Knapp v. Consolidated Rail Corp.*, 1992 WL 170891 at 5 (W.D.N.Y. 1992). So here, the EuroTec Defendants sharing counsel shows that they share personnel and exhibits a disregard for corporate formalities as well as serving as evidence that EVFS is exerting operational control of EuroTec Canada through their common attorney.

These evidence shows that facts may exist to support the exercise of personal jurisdiction over the EuroTec Defendants as a result of EuroTec serving as a "mere department" of EVFS and installing the flotation system on the subject helicopter. Jurisdictional discovery will reveal the full extent of involvement between these companies.

C. Plaintiffs Have Facts That Show a Good Start to Confer Jurisdiction by a New York Court Over a Non-Domiciliary

New York applies a two step-analysis in determining whether a non-domiciliary may be sued in New York. *LaMarca v. Pak-More Mfg. Co.*, 95 N.Y.2d 210, 214 (2000). First, the court must determine "whether [the] long-arm statute (CPLR § 302) confers jurisdiction over it in light of its contacts with this State." *Id.* If so, the court must determine "whether the exercise of jurisdiction comports with due process." *Id.*

1. The Facts Show "a Good Start" to Proving Jurisdiction Under New York's Long-Arm Statute

The provision on which Plaintiffs believe jurisdiction rests is that involving a tortious act without the state causing an injury within the state:

> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
>
> . . . .
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; . . . .

McKinney's CPLR § 302(a). Jurisdiction on this basis requires the satisfaction of five elements:

> [(1)] that defendant committed a tortious act outside the State; [(2)] that the cause of action arises from that act; [(3)] that the act caused injury to a person or property within the State; [(4)] that defendant expected or should reasonably have expected the act to have consequences in the State; and [(5)] that defendant derived substantial revenue from interstate or international commerce.

LaMarca, 95 N.Y.2d at 214. Here, the first three elements are satisfied: EuroTec Canada installed the Apical flotation system on the subject helicopter, and this cause of action arises from the sinking of the helicopter into the East River in New York and the drowning of Trevor Cadigan.

The fourth element, that defendant expected or should reasonably have expected the act to have consequences in the State, does not require that the defendant "foresee the specific event that produced the alleged injury." *Id.* Rather, the defendant need only reasonably foresee that any defect in its service would have direct consequences within the State. *Id.* In addition, "[t]he test of whether a defendant expects or should reasonably expect his act to have consequences within the State is an objective rather than a subjective one." *Allen v. Auto Specialties Mfg. Co.*, 45 A.D.2d 331, 333 (3rd Dep't 2014).

In *LaMarca*, an employee of the Town of Niagara was injured when he fell from a garbage truck equipped with a loading device from Pak-Mor, a Texas corporation that manufactures garbage-hauling equipment. *Id.* at 213. Pak-Mor had no property, offices, telephone numbers or employees in New York but had a New York distributor. *Id.* The invoice noted Niagara, New York as the destination for the loading device and listed the device as a "New York Light Bar."

Id. Because "Pak–Mor's invoice, including its reference to a "New York Light Bar," shows that it knew the rear-loader was destined for use in New York," the court found that "Pak–Mor had reason to expect that any defects would have direct consequences in this State." *Id.* at 215.

Here, EuroTec Canada's Rotorcraft Service Agreement lists the address of the purchaser, Meridian, as Kearney, New Jersey, which is only two minutes away from the Manhattan Downtown Heliport (*Schwartz Aff.* ¶ 16, Exhs. U and V). Despite Meridian being listed on that Agreement as the customer, EuroTec Canada's "Build Sheet" references "Liberty Helicopters" (*Schwartz Aff.* ¶ 15, Attachment A and Exh. T). These facts, together with Liberty Helicopter's website and its status as a leading helicopter tour company in New York, indicate that EuroTec Canada was aware of Meridian's business and that this helicopter would be flown in New York by Liberty. Just like the defendant in *LaMarca*, EuroTec Canada likely knew that this helicopter – with the flotation system it installed – was headed for New York.

The last element, defendant's deriving substantial revenue from interstate or international commerce, is intended to shorten "the long-arm reach to preclude the exercise of jurisdiction over non-domiciliaries who might cause direct, foreseeable injury within the State but 'whose business operations are of a local character.'" *LaMarca*, 95 N.Y.2d at 215. In *LaMarca*, the court found that Pak-Mor, as a Texas corporation with a manufacturing facility in Virginia, could not be considered "local." *Id.* And Pak-Mor's sales in New York totaled $514,490, about 2.8% out of total revenue of $18,245,292 and its advertising in nationally published trade magazines showed that "the company derive[d] substantial revenue from interstate commerce." *Id.* at 213, 215-16. The court had "no difficulty in concluding that CPLR 302(a)(3)(ii) was satisfied in this case." *Id.* at 216.

The affidavits provided by the EuroTec Defendants do not address their international and interstate revenue to show that they are not operating locally. But EVFS is not a local operation as it admits on its website that it serves customers worldwide (*Schwartz Aff.* ¶ 9, Exh. J).

The only revenue figure that EVFS disclosed was the percentage of parts sales in New York, but "the 'interstate commerce' prong of clause (ii) requires no direct contact with New York State." *Ingraham v. Carroll*, 90 N.Y.2d 592, 598 (1997).

2. Due Process Requires the Discovery of Facts About the EuroTec Defendants' Direct and Indirect Efforts to Serve the New York Market

A state court may exercise jurisdiction over non-domiciliary defendants if they had "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *LaMarca*, 95 N.Y.2d at 216 (quoting *International Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945)). "Minimum contacts" requires that a non-domiciliary defendant may reasonably foresee the prospect of defending a suit there based on it 'purposefully avail[ing] itself of the privilege of conducting activities within the forum State.'" *Id.* (citing *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Purposeful availment does not occur when a product happens to end up in the forum state based on others' actions; rather, the sale of a product "arises from the efforts of the manufacturer or distributor *to serve directly or indirectly*, the market for its product" in a state where its product causes injury. *Id.* at 217-18 (emphasis added) (ruling that the defendant sought to serve the New York market by using a distributor to sell its products in New York).

In *LaMarca*, the defendant argued "that it had no contacts or purposeful affiliation with New York, asserting that 'it did not direct activities at New York residents' and that it 'performed manufacturing in Virginia for customers who paid, received title and accepted delivery in Virginia.'" The court found these facts "far from dispositive." *Id.* at 217. What the court did find

dispositive was that "Pak–Mor itself forged the ties with New York" by using a New York distributor. *Id.*

Here, the EuroTec Defendants deny:

- Doing "business in the State of New York;"
- Since 2015, deriving "any revenue from the sale or lease of helicopters from any customers located in the State of New York;"
- Since 2015, deriving "any revenue from performing any maintenance, repairs, and/or overhauls on helicopters or engines from any customers located in New York" [EuroTec Canada: " . . . from any *companies* with a New York address"];
- EuroTec Canada only: Since 2015, shipping "any parts to customers in New York."

(Affidavit of Chad Decker, Dkt No. 127, *Schwartz Aff.* ¶ 18, Exh. AA; Affidavit of Hoss Golanbari, Dkt No. 128, *Schwartz Aff.* ¶ 15, Exh. T, Statements 13-16). EVFS admitted shipping parts "occasionally" to customers "in New York." Statement 16, *Schwartz Aff.* ¶ 18, Exh. AA).

There is good reason for the EuroTec Defendants not to have any customers or sales in *New York City*. The City permits the operation of tour helicopters only between 9 a.m. and 7 p.m., prohibiting their presence in the City otherwise (*Schwartz Aff.* ¶ 17, Exh. Z). These restrictions force "[a]ll of the operators—tour, charter, and corporate—to keep maintenance and administrative hangars outside of the city, mostly in New Jersey" (*Schwartz Aff.* ¶ 17, Exh. Y). For this reason, none of the helicopters flying in New York City are based there. *Id.*

While the EuroTec Defendants are unlikely to have customers or sales in New York City, they do have customers in New Jersey who fly their helicopters in New York City, like Meridian/Liberty Helicopters here. They apparently do not classify these sales as New York transactions.

Over New York City, there were over 56,000 sightseeing tourist helicopter trips in 2014 (*Schwartz Aff.* ¶ 17, Exh. X). The market of New York City tour helicopters is substantial here,

particularly where EuroTec Canada served the tour company with the biggest fleet – Liberty Helicopters -- at least once (*Schwartz Aff.* ¶ 8, Exh. I).

In *LaMarca*, the court also found that the exercise of jurisdiction comported with traditional notions of fair play and substantial justice based upon Pak-Mor's use of a New York distributor and its maintenance of a facility in Virginia. *Id.* at 218. And as a United States corporation fully familiar with this country's legal system," the court concluded that the burden on Pak-Mor was "not great." *Id.* The court also noted that "New York has an interest in providing a convenient forum for LaMarca, a New York resident who was injured in New York and may be entitled to relief under New York law." *Id.* Last, the court reasoned, that because plaintiff could sue all named defendants in New York, a "single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy." *Id.* at 219.

While EuroTec Canada is not a U.S. company, its parent company, EVFS, is a U.S. company fully familiar with this country's legal system and who is also named as a defendant in this case and will likely defend itself on the same basis as EuroTec Canada. (*See* § III.B.) The EuroTec Defendants sharing legal counsel, as they are in this case, will also ease any burden of defending themselves here. New York's interest in providing a convenient forum for the parents of a New York resident who died in a helicopter crash in New York will be served by proceeding here, which will allow Plaintiffs to sue all named defendants in a single action, serving as the most efficient resolution of this controversy. The exercise of jurisdiction over the EuroTec Defendants, then, comports with traditional notions of fair play and substantial justice.

D. The Information Provided by the EuroTec Defendants in Their Affidavits Fail to Establish That a New York Court Cannot Exercise Jurisdiction Over Them

1. A Defendant's Physical Presence Is Not Necessary for a State Court's Exercise of Jurisdiction Over It

The Supreme Court has ruled that physical presence is unnecessary for the exercise of jurisdiction:

> Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, *it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.*

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (emphasis added). The court concluded that "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.*

Specific to New York, "the New York Court of Appeals and the Second Circuit have rejected the argument that a court does not have personal jurisdiction over a corporation because it lacks physical presence here." *King County, Wash. v. IKB Deutsche Industriebank AG*, 712 F.Supp.2d 104, 114 (S.D.N.Y. 2010).

So EVFS's and EuroTec Canada's lack of physical presence here is not relevant. (Chad Decker's affidavit on behalf of EVFS, Statements 5-12, *Schwartz Aff.* ¶ 18, Exh. AA; Hossein Golanbari's affidavit on behalf of EuroTec Canada, Statements 5-12, *Schwartz Aff.* ¶ 15, Exh. T).

2. EVFS's and EuroTec Canada's Statements That Deny Doing Business in New York Are Irrelevant to the Exercise of Jurisdiction Under Section 302(a)(3)(ii)

New York City's helicopter flight restrictions may limit the EuroTec Defendants' ability to do business *in* New York City, but neither the New York long-arm statute nor due process requires that. What is relevant is that EuroTec Canada expects or should reasonably expect that the helicopters it serves will fly in New York City and that its installation of flotation systems will have consequences in the State of New York. Because these tour helicopters fly over New York City all day every weekday, a reasonable defendant should expect the consequences of its work on a New York City tour helicopter to be felt in New York. Because these helicopters are garaged in New Jersey, the EuroTec Defendants likely classify these transactions and customers as New Jersey rather than New York.

A New York court noted this problem in another case involving personal jurisdiction where the defendant used a "narrow definition of 'New York customers' as those having a New York address. *Chestnut Ridge Air, Ltd. v. 1260269 Ontario, Inc.*, 13 Misc.3d 807, 810-11 (N.Y. Sup. Ct. 2006) (citing as an example where the defendant classified as out of state a transaction in which a Michigan business contacted the company on behalf of a New York resident). There, much like here, the defendant sought to avoid jurisdiction, claiming only 5% of its revenue from New York clients. *Id.* But the court found the defendant's contacts with New York "more than sufficient to establish continuous activity" with revenues of "$102,583 in 1999; $108,590 in 2000; $85,301 in 2001; $61,728 in 2002; $271,722 in 2003; $183,764 in 2004; $2,181 in 2005; and $84,935 thus far in 2006" and the defendant spending 14 weeks a year on New York business. *Id.* at 811; *see also Energy Brands, Inc. v. Spiritual Brands, Inc.*, 571 F.Supp.2d 458, 472 (S.D.N.Y. 2008) (ruling that "revenue of $158.53 earned from sales in New York is sufficiently substantial" where the defendants were not "forthcoming regarding their sales in New York," providing

documentation only in the form of a simple spreadsheet that was created solely for the motion); *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F.Supp. 494, 498 (S.D.N.Y. 1997) (noting that the defendant "stated twice on its home page that it could help customers "across the U.S." [and] had signed up six New York subscribers").

Here, EuroTec Canada employs this same narrow definition disapproved of by the court in *Chestnut Ridge* in its statement denying "revenue from performing any maintenance, repairs, and/or overhauls on helicopters or engines *from any companies with a New York address*" (Statement 15, *Schwartz Aff.* ¶ 15, Exh. T) (emphasis added). Based on New York City's restrictions on helicopter flights, this definition is likely to yield the results that EuroTec Canada desires but not one that is helpful to this Court.

Unlike the court in *Chestnut Ridge*, Plaintiffs and this Court cannot assess EuroTec Canada's or EVFS's New York revenue where they have failed to provide information about how they classify sales. And neither company provided even a "simple spreadsheet," which the court found was deficient in *Energy Brands*. While EuroTec offers no information about its New York revenue, EVFS claims that it "occasionally shipped parts to customer in New York, which accounted for "less than one percent of EuroTec Vertical's annual revenue" (Statement No. 16, *Schwartz Aff.* ¶ 18, Exh. AA). Without an explanation about how EVFS classifies it sales, this number is meaningless. With EVFS and EuroTec Canada as equally as reticent as the defendant in *Energy Brands*, their sales -- even if meager -- should be sufficiently substantial for the exercise of jurisdiction.

And just as *American Network* claimed that it could help customers across the U.S., EVFS claims that it serves customers worldwide:

> So whether you are a tour operator in Las Vegas needing an engine or in need of a sliding door kit for a production aircraft in Australia, our knowledgeable and

> courteous sales staff will deliver on time, every time, with reliable components for every type of operation; anywhere in the world.

(*Schwartz Aff.* ¶ 9, Exh. J). This of course would include serving customers in New York and those in New Jersey, who fly their helicopters in New York.

3. The EuroTec Defendants Deny Revenue for a Period of Time That Is Not Relevant to This Case

In evaluating the appropriate period for a jurisdictional inquiry, the Second Circuit Court of Appeals noted that "the minimum contacts inquiry is fact-intensive, and the appropriate period for evaluating a defendant's contacts will vary in individual cases." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-70 (2d Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996). Finding that the district court limiting the jurisdictional inquiry to a single year was inappropriate, the court ruled that "[t]he determination of what period is reasonable in the context of each case should be left to the court's discretion. *Id.* at 570.

Here, to satisfy due process concerns, EuroTec Canada's minimum contacts with New York must be such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *LaMarca*, 95 N.Y.2d at 216. EuroTec Canada limited that period, denying that it derived revenue from New York since 2015 (*Schwartz Aff.* ¶ 15, Exh. T, Affidavit of Hoss Golanbari, Statements 14-16). But the flotation system was installed in **2013** (*Schwartz Aff.* ¶ 15, Exh. T), so the relevant period should center around that date; a five-year period from 2011-2015 would be appropriate.

4. EuroTec Canada Failed to Attach the Warranty for the Installation of the Subject Flotation That Was Referenced by a Cover Sheet to the Rotorcraft Service Agreement

Although it failed to provide the warranty itself, EuroTec apparently provided a "limited warranty" for the installation of the subject flotation system as indicated by the inclusion of a cover

sheet for the warranty (*Schwartz Aff.* ¶ 15, Exh. T (Exhibit A to Affirmation of Hossein Golanbari)).

When a company offers a warranty to a customer, it "has obligated itself to its customers in the [forum state] for many years to come, . . . tend[ing] to suggest ongoing business relationships between that company and [forum state] residents." *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 335 (3d Cir. 2009). Here, EuroTec Canada provided a warranty that applied to the work performed on the New York City tour helicopter. As a result, EuroTec Canada obligated itself to this helicopter and established an ongoing relationship with its owner.

To be subject to the jurisdiction of a court in New York, the EuroTec Defendants need not pay taxes, own or lease property, have a registered agent, maintain bank accounts or facilities, or be registered or authorized to do business in New York. But if they serve the market for helicopters that fly in New York – regardless of where those helicopters are garaged for the night, those attempts to serve that market subjects the EuroTec Defendants to jurisdiction in New York. Without a definition for what constitutes New York sales or customers, the revenue figure for New York provided by EVFS is as meaningless as the absence of one for EuroTec Canada.

As to constitutional due process, the exercise of jurisdiction also satisfies traditional notions of fair play and substantial justice. (*See* § III.C.2, herein).

E. The Law Cited by the EuroTec Defendants Also Fails to Establish That They Are Not Subject to the Jurisdiction of This Court

1. "Ongoing Activity" With a Substantial Nexus to the Plaintiff's Claim Is Not Required by *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*

The EuroTec Defendants claim that Section 302(a)(3) requires "some ongoing activity within the state. But that is true only with respect to Section 302(a)(3)(i). *Ingraham v. Carroll*, 90 N.Y.2d 592, 597 (1997) ("CPLR 302(a)(3)(i) necessitates some ongoing activity within New

York State"). But Plaintiffs here assert jurisdiction under Section 302(a)(3)(ii). So no ongoing activity is required on this basis.

The EuroTec Defendants also claim that *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017) requires that "[t]he ongoing activity in New York, however, must have a substantial nexus with the plaintiff's claim." But that is not true. *Bristol-Myers* requires only "an affiliation between the forum and the underlying controversy, principally, *[an] activity or an occurrence* that takes place in the forum State and is therefore subject to the State's regulation." *Id.* at 1780 (emphasis added). In that statement, activity is a one-time event and not ongoing. In *Bristol-Myers*, the court ruled that a California court could not exercise specific jurisdiction over the defendant where the plaintiffs were not residents of California and did not suffer harm in California. *Id.* at 1782. Here, in contrast, a New York resident drowned in New York when the New York City tour helicopter, on which EuroTec Canada had installed a floatation system, sank. EuroTec Canada, by installing the flotation system on a New York City tour helicopter – and EVFS under the "mere department" theory – should have reasonably anticipated being haled into court here. The EuroTec Defendants themselves created this contact with New York by installing the flotation system on a New York City tour helicopter.

2. The Facts of *Williams v. Beemiller, Inc.* Are Inapposite Here

The EuroTec Defendants also compares this case with the facts in *Williams v. Beemiller, Inc.*, 159 A.D.3d 148 (4th Dep't 2018) to claim that minimum contacts are absent here. In *Williams*, the court held that due process requirements did not permit the exercise of jurisdiction over an Ohio gun dealer that sold guns to a gun trafficker, one of which was illegally re-sold to an individual in New York who used it to injure another person. *Id.* at 150-51. The court ruled that the gun dealer did not have sufficient contacts with New York to permit the exercise of jurisdiction

over him where his buyer "unilaterally elected to transport [the guns] to Buffalo for resale on the illegal market," although the dealer was aware that the buyer planned to open a gun store in New York sometime in the future.

Here, in contrast, EuroTec Canada's buyer, Meridian, owned this helicopter to conduct tours over New York City. The helicopter was not unilaterally transported to a different location but returned to the same location and resumed operations as a New York City tour helicopter. *Williams* is not applicable here.

3. The Ruling of *Ingraham v. Carroll* Was Based on the Defendant's Practice Being Local in Nature

In *Ingraham v. Carroll*, 90 N.Y.2d 592 (1997), a Vermont physician misdiagnosed a New York medical condition and made improper recommendations to New York physicians for her care. *Id.* at 595. In determining whether jurisdiction could be exercised over the Vermont doctor under Section 302(a)(3)(ii), the court found the first prong -- "expects or should reasonably expect the act to have consequences in the state" – satisfied by the doctor's awareness of the patient's New York residence and his recommendations to New York doctors. *Id.* at 598. But the court found that "the interstate commerce prong" was not satisfied where "the provision of medical services may never meet the definition of 'commerce' for jurisdictional purposes" and is "a service that is inherently personal, and local, in nature." *Id.* at 599-600.

But here, EuroTec Canada's products and services are not "inherently personal, and local, in nature." The fact that it installed the subject flotation system on a New York City tour helicopter is evidence that it serves the area outside of Ontario. Further, Apical's choice of EuroTec Canada for inclusion as a partner in its Approved Maintenance Center based on its "market reach" implies a wide service area as well.

A case closer to these facts than *Ingraham* is *Reynolds v. Aircraft Leasing, Inc.*, 194 Misc.2d 550 (N.Y. Sup. Ct. 2002). There, Precision, a Washington State corporation, manufactured and sold fuel controls for the general aviation piston aircraft market and overhauled carburetors. *Id.* at 551. Like the EuroTec Defendants, it was not licensed or authorized to do business in New York, had no registered agent in New York, paid no taxes in New York, and had no bank accounts, place of business or address, owned no real estate and had no officers, directors or employees in New York. *Id.* at 552. Precision was sued in New York after a plane crashed there in which a carburetor overhauled by it had been installed. *Id.* The carburetor had been sent to Precision in Washington by an engine manufacturer in Pennsylvania and returned by Precision to Pennsylvania. *Id.* Precision shipped its products FOB 'our dock,' meaning that the item belonged to the customer once it left Precision's dock. *Id.*

The court determined that "the sole disputed element is whether Precision expected or should reasonably have had reason to expect that its tortious act (overhauling the carburetor) committed in another state (Washington), would have direct consequences in this State when in fact, the carburetor came from and was returned to Pennsylvania." *Id.* at 554 (internal citation omitted). First, the court noted that "a defendant need not foresee the specific event that produced the alleged injury; instead, the defendant need only reasonably foresee that any defect in its product would have direct consequences within the State." *Id.* The court found that the defendant had advertised in general trade magazines and maintained a worldwide website that listed distributors of its products and warranty stations in the United States and that a distributor and a warranty repair station was located in New York. *Reynolds*, 194 Misc.2d at 552. Its sales in New York amounted to 2% of its total sales of $12 million. *Id.* at 553.

Because Precision manufactured and sold parts worldwide for plane engines and sold its products directly and indirectly to New York businesses, the court found that, "Precision's intended distribution activities made it foreseeable that its products would be found in New York, and that its alleged negligent overhaul and manufacture of carburetors in Washington, and sales to other states as well as New York, could have direct and expected consequences in New York." *Id.* at 555. As a result, the court found the exercise of jurisdiction over Precision proper under CPLR § 302(a)(3)(ii). *Id.*

The court then analyzed whether the exercise of jurisdiction was proper under due process standards. Concluding that it was indeed proper, the court noted that, based on Precision's "efforts to forge ties with New York resulting in numerous sales of its products," it "had every reason to foresee that there could be the prospect of being haled into court here if its defective products caused injury. *Reynolds*, 194 Misc.2d at 556.

As to traditional notions of fair play and substantial justice, the court considered "the burden on the defendant, the interests of the forum State and the plaintiff's interests in obtaining relief" as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (citing *LaMarca*). The court concluded that "[t]he burden on Precision is not great, as it is a United States corporation fully familiar with the country's legal system, and it took advantage of the New York market for its products." *Id.* at 557. It also reasoned that "New York has a strong interest in providing a forum for the plaintiffs, as the injuries occurred here as a result of the allegedly defective carburetor, and the New York plaintiffs have a strong interest in bringing Precision into a New York court." *Id.* Noting that "both the accident and investigation into the

accident occurred in New York," the court found that the exercise of jurisdiction "comports with due process." *Id.*

Here, just as in *Reynolds,* EuroTec Canada's work was performed outside of the forum state. Where Precision overhauled the carburetor in Washington State, EuroTec Canada installed this flotation system in Ontario. And while both defendants relinquished ownership of their work upon completion at their respective locations (*Schwartz Aff.* ¶ 15, Exh. T, p. 3, ¶ 7), Precision shipped the carburetor to an engine manufacturer in Pennsylvania and that engine was later installed on the plane in question. EuroTec Canada, on the other hand, installed the flotation system directly on the subject helicopter. There was no middleman here. This means that EuroTec Canada had more of a reason than Precision to foresee that there could be the prospect of being haled into court here if the installation of the flotation system on a New York City tour helicopter caused injury here. While there is no evidence of the EuroTec Defendants' advertising, it is a fact that EuroTec Canada is a partner in DART Aerospace's Approved Maintenance Center network (*Schwartz Aff.*, Exh. S), which refers customers of DART products, including its flotation system, to its network partners. What is more, EVFS serves the helicopter market worldwide, which EuroTec Canada, as a "mere department," facilitates by serving customers in Canada and at least New York. Jurisdictional discovery will provide the full extent of the EuroTec Defendants' contacts with New York.

III. CONCLUSION

In this Response, Plaintiffs provide facts that set forth a sufficient start, showing that facts may exist to support the exercise of personal jurisdiction over the EuroTec Defendants and that its position is not frivolous. The facts also show that EuroTec Canada operates as a "mere department" of EVFS, rendering the contacts of both defendants relevant to the exercise of

jurisdiction over them. The facts provided by the EuroTec Defendants provide no assistance to this Court in ruling on jurisdiction as they are irrelevant or ambiguous. Jurisdictional discovery will provide the relevant facts necessary for the Court to rule on the EuroTec Defendants' Motion to Dismiss.

WHEREFORE, for the above-stated reasons, Plaintiffs respectfully request that this Court enter an Order denying EuroTec Vertical Flight Solutions, LLC's and EuroTec Canada Ltd.'s Motion to Dismiss. In the alternative, the Court should grant Plaintiffs' cross-motion and defer ruling on the motion and permit Plaintiffs an opportunity to conduct discovery on jurisdictional issues and for such other and further relief as the Court deems just and proper.

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